

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

|   |   |          |
|---|---|----------|
| In the Matters of                         | ) |          |
|   | ) |          |
| Policies and Rules                        | ) |          |
| Governing Retirement of Copper Loops      | ) |          |
| By Incumbent Local Exchange Carriers      | ) |          |
|   | ) | RM-11358 |
| Petition of XO Communications, LLC,       | ) |          |
| Covad Communications Group, Inc., NuVox   | ) |          |
| Communications and Eschelon Telecom, Inc. | ) |          |
| For a Rulemaking to Amend Certain Part 51 | ) |          |
| Rules Applicable to Incumbent LEC         | ) |          |
| Retirements of Copper Loops and Copper    | ) |          |
| Subloops                                  | ) |          |

**REPLY COMMENTS**

*BridgeCom International, Inc.  
Broadview Networks, Inc.  
Cavalier Telephone, LLC  
Eureka Telecom, Inc. d/b/a InfoHighway  
Communications  
Florida Digital Network, Inc. d/b/a FDN  
Communications  
IDT Corporation  
Integra Telecom, Inc.  
DeltaCom, Inc.  
McLeodUSA Telecommunications Services, Inc.  
Mpower Communications Corp.  
Norlight Telecommunications, Inc.  
Pacific Lightnet, Inc.  
RCN Telecom Services, Inc.  
RNK, Inc.  
Talk America Holdings, Inc.  
TDS Metrocom, LLC; and  
U.S. Telepacific Corp. d/b/a Telepacific  
Telecommunications*

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### Summary

The Commission should grant the Petitions for Rulemaking and promptly issue an NPRM. ILEC arguments that the relief requested in the Petition would adversely affect ILEC next generation network investment incentives have no merit. A few years ago, ILECs argued "new investment, new rules"; now they claim that preserving the old rules for old, copper loop investment thwarts their investment incentives. Petitioners are not requesting "sharing" of ILEC loops; therefore, any alleged affect of "sharing" on investment incentives is not implicated by the Petition. ILECs will not experience investment inhibiting inefficiencies by retaining spare copper loops because loops that ILECs would otherwise discard are superfluous to ILEC operations. ILECs would not experience unreimbursed costs because under current rules ILECs are not required to maintain copper that is not being used, and when providing copper loops as UNEs could charge cost-based rates plus a profit.

Far from discouraging investment, maintaining existing policies requiring unbundled access to copper loops that ILECs would otherwise abandon will ensure an alternative, intermodal equivalent, third wire into the home that provides a platform for broadband investment and innovation. Limiting copper retirement will promote broadband goals because CLECs can provide affordable, innovative broadband service options in areas not served by fiber or to customers that choose not to subscribe to fiber services.

Petitioners do not seek a modification in any respect of the impairment findings or unbundling rules established in the *TRO*. There, the Commission found that CLECs were impaired in provision of broadband without, and required ILECs to provide, unbundled access to copper loops. Petitioners are not here seeking unbundled access to next generation networks.

ILEC statements that they are not retiring copper loops are not reassuring because, even if true, there are number of transient reasons why BOCs could be hedging their bets before engaging in widespread retirement of valuable copper loops. Verizon's request that it be permitted to retire loops in place merely reinforces concerns that ILECs will retire copper loops for anticompetitive reasons.

ILEC concerns about pricing of unbundled access to copper loops and possible auctions of copper loops are bogus since they are complaining about receiving substantial revenue from lease or sale of spare copper in contrast to receiving nothing if they retire them. The Commission should obtain a record on the issue of possible auctions of loops in order to make an informed decision.

ILECs miss the point concerning homeland security issues. Although it is possible that copper and fiber loops running in parallel might both be affected by an attack or natural disaster, it is equally the case that the different characteristics of fiber and copper may permit one technology to survive or be more readily restored depending on the nature of the incident. It is the diversity of facilities, and of providers, that promotes homeland security. A critical advantage of copper is that it provides line-powered service, assuring that consumers may reach 911 providers during an extended power outage.

The Commission should promptly grant the petition so that ILECs may not unnecessarily waste valuable copper loops for anticompetitive reasons.

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Subloops )

**REPLY COMMENTS**

The undersigned competitive carriers (“Petitioners”) submit these reply comments in the above-captioned proceedings.<sup>1</sup> For all the reasons stated herein and in the Petition for Rulemaking and Clarification (“Petition”) filed by Petitioners, the Commission should promptly initiate a rulemaking to establish greater oversight of retirement of copper loops by incumbent local exchange carriers.

**I. UNBUNDLED ACCESS TO COPPER LOOPS WILL PROMOTE, NOT UNDERMINE, BROADBAND INVESTMENT AND INNOVATION**

ILECs contend that limiting their ability to retire copper loops will undermine the Commission’s pro-investment broadband policy because “forced sharing” and the supposed costs and inefficiencies of maintaining copper would inhibit incentives to invest in next generation net-

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<sup>1</sup> Pleading Cycle Established for Comments on Petitions for Rulemaking and Clarification Regarding the Commission’s Rules Applicable to Retirement of Copper Loops and Copper SubLoops, Public Notice, RM-11358, DA 07-209, released January 30, 2007.

works.<sup>2</sup> This argument is refuted by the ILECs' own earlier advocacy concerning investment incentives, which was summed up in the catch-phrase "new investment, new rules."<sup>3</sup> Verizon previously advocated the "Status Quo for CLECs Over All-Copper Facilities" including provision of competitive DSL-based services over unbundled copper loops.<sup>4</sup> ILECs and their "high tech" supporters previously urged adoption of rules that exempted next generation networks from unbundling but required access to legacy copper.<sup>5</sup> Accordingly, the ILECs have already contradicted their current claim that unbundled access to legacy networks inhibits new investment incentives in next generation networks.

Second, Petitioners are not requesting any so-called "sharing" of ILEC next generation or fiber facilities. Rather, Petitioners simply seek assurance that copper facilities that ILECs would not be using and would otherwise abandon will continue to be available for unbundling. Limiting ILECs' ability to retire copper as requested in the Petition will not mandate any "sharing." ILECs would retire copper only when they have installed overbuild fiber and no longer intend to use the copper facilities to provide service. CLECs are not seeking any change in the rules that limit

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<sup>2</sup> AT&T at 5; Verizon at 8.

<sup>3</sup> *Review of § 251 Unbundling Obligations of Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rule-making, 18 FCC Rcd 16978, ¶ 293 (2003) ("TRO"), citing TRO proceeding comments of Alcatel at 15-17; SBC Reply at 109; Verizon January 10, 2003 Ex Parte Letter at 6-7; Verizon November 22, 2002 Ex Parte Letter at 4. See Also

<sup>4</sup> Laying the Last Mile, Presentation to Progress and Freedom Foundation, Tom Tauke, Senior Vice President Public Policy and External Affairs, Verizon Communications, August 21, 2001, slide 19, <http://newscenter.verizon.com/press-releases/verizon/2001/page.jsp?itemID=29738856>, viewed April 2, 2007.

<sup>5</sup> Letter to Michael K. Powell from High Tech Broadband Coalition Comments, CC Docket No. 01-338, filed January 24, 2003, at 1.

ILECs' obligation to provide unbundled access to overbuilt fiber loops. Under this scenario, therefore, the fiber would be used exclusively by the ILEC and the copper would be used exclusively by CLECs; neither would be "shared."

ILECs' investment incentive arguments are also invalid because ILECs would not incur any inefficiencies or unreimbursed costs in retaining copper. There would be no network operational inefficiencies because ILECs' traffic will be carried over separate fiber exempt from unbundling. ILEC claims of inefficiencies are completely unexplained and unsupported. In fact, the retirement of copper is more likely to cause operational inefficiencies when loops must be "shared," as in the situation where current rules require ILECs to provide a voice grade channel over "brownfield" fiber.<sup>6</sup> Nor would ILECs experience unreimbursed costs. Under current rules, ILECs are not required to maintain copper that is not actually being used, but are required to incur relief and rehabilitation costs when a CLEC requests unbundled access.<sup>7</sup> Petitioners have not requested any change in that requirement. Those costs, and any other reasonable costs of operating unbundled loop facilities, will be recovered by the ILECs through cost-based rates for unbundled access to copper loops which, under TELRIC, includes a reasonable profit.<sup>8</sup>

By contrast, retirement of copper would mean that ILECs would receive no UNE revenues whatsoever and if they actually remove copper would incur costs of removal. ILEC arguments on this point reveal clearly that they would prefer to retire copper for anticompetitive

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<sup>6</sup> 47 C.F.R. § 51.319(a)(1)(3)(ii)(C).

<sup>7</sup> TRO ¶ 277.

<sup>8</sup> This would almost certainly continue to be the case under any revised UNE pricing formula. *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*. WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (September 15, 2003).

reasons even if the consequence is foregoing revenue and profits from copper infrastructure. Accordingly, the Commission should reject ILECs' contention that limits on retiring copper loops could inhibit investment in fiber because of inefficiencies or unreimbursed costs.

In addition, ILEC concerns about the impact on incentives of placing limits on copper loop retirement are grossly exaggerated and self-contradictory. ILECs contend that they are not significantly retiring copper loops<sup>9</sup> and at the same time that they are investing heavily in broadband.<sup>10</sup> If their "incentive" arguments were valid, ILECs would be expected to retire copper in lockstep with fiber deployment. Since they themselves claim that is not the case, there cannot be a connection between copper retirement and the incentives to invest in fiber.

On the contrary, the availability of copper loops for unbundled access would stimulate ILEC investment. Copper loops that ILECs choose to let lie fallow could, in effect, be a new wire into the home for delivering competitive services to consumers, including broadband services that are within the range of the technical capabilities of copper (although in actuality copper loops were the first wires to the home). In this scenario, copper loops used by competitors would be the equivalent of intermodal facilities in terms of the impact on ILECs' investment incentives in next generation networks as they would be unused by the ILEC and separate from ILECs' overbuild fiber. The Commission has recognized that intermodal competition serves as a spur for ILECs to upgrade their own networks.<sup>11</sup> The alleged facts that ILECs are not retiring copper but are investing heavily in fiber supports the proposition that competition from copper

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<sup>9</sup> AT&T at 11; Verizon at 22.

<sup>10</sup> Verizon at 12; AT&T at 10; Qwest at 2.

<sup>11</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 02-33, FCC 05-150, released September 23, 2005, ¶ 57.

can stimulate investment. Unbundled access to spare copper loops will provide an incentive to ILECs to invest in next generation facilities with a superior range and quality of services than CLECs could provide over copper. To the extent fiber is already in place, copper based competition will benefit consumers by simulating ILECs to offer superior quality, new service options, and competitive prices.

Contrary to ILEC arguments, preserving unbundled access to spare copper loops will promote innovation. A disturbing fact has recently been reported: AT&T and Verizon together account for about two-thirds of all capital spending by domestic carriers.<sup>12</sup> While there were once 10 major carriers making network investments, including GTE, MCI, and AT&T Corp., now the overwhelming majority of network design and innovation decisions will be made by only two carriers. This seriously harms the long term potential for innovation in the United States domestic network. Relying on only two carriers for most U.S. network design decisions will necessarily limit diversity and restrict innovation. ILECs are historically slow and cautious in implementing network changes because of the costs involved, further limiting the potential for innovation.

To emphasize this point, we turn to the Commission's own statistics concerning the alarming consolidation in the ILEC industry. According to the latest *Trends in Telephone Service* report from February 2007,<sup>13</sup> the three remaining Bell Companies (AT&T, Verizon and Qwest) hold 84.9% of the ILEC telephone loops in the United States (as of December 31, 2005). See Table 7.3 on p 7 - 7. In addition, eleven years after the "pro-competitive" Telecom Act of

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<sup>12</sup> "Mega-Carriers Wield 800-Pound Purses," *Telephony*, February 5, 2007, p. 8.

<sup>13</sup> *Trends in Telephone Service, Industry Analysis and Technology Division, Federal Communications Commission, February 2007.*

1996 became law, the ILECs still hold 82.7% of the end-user switched access lines in the country (as of June 2006). See Table 8.1 on pg. 8 - 5.

If anything, this evolving trend of concentrating key network design decisions in a few ILECs, as well as the *TRO* broadband policy generally that immunizes next generation networks from unbundling, inhibits broadband growth and innovation. Contrary to ILECs oversimplified incentive arguments, broadband deployment was growing rapidly even before the Commission exempted next generation networks from unbundling obligations.<sup>14</sup> Similarly, some of the investment figures cited by ILECs include growth prior to the adoption of the *TRO*.<sup>15</sup> In fact, the Commission's broadband policies may well be the explanation for why the United States is lagging behind other countries in broadband development. Before the *TRO*, the United States was fourth in broadband penetration rates.<sup>16</sup> Now, the United States is 15th in broadband penetration.<sup>17</sup> Many of the countries that have pulled ahead of the United States have strong unbundling policies.<sup>18</sup>

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<sup>14</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All American in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, released February 6, 2002 (“*Fourth Broadband Report*”) (reporting that investment in infrastructure for most advanced services markets “remains strong,” at 5; reporting that penetration of advanced services had quadrupled, at 16.)

<sup>15</sup> Verizon at 11-12.

<sup>16</sup> *Fourth Broadband Report* at 6.

<sup>17</sup> *America's Internet Disconnect*, by Michael J. Copps, Wednesday, November 8, 2006; Page A27 <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/07/AR2006110701230.html>, viewed March 28, 2007.

<sup>18</sup> Competition in Europe also heavily relies on copper line unbundling that is mandated by the EU “Unbundled Local Loop” Directive of 2000. Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2887:EN:HTML>.

By preserving the availability of spare copper loops, the Commission can protect an alternative means of access to customers and, in addition, provide a platform for more innovation. In fact, technical developments since the *TRO* permit higher broadband speeds and provision of a triple play of voice, Internet access, and video programming by CLECs over copper. This is just the sort of innovation that ILECs would thwart with the copper retirement policies at issue. The Commission should adopt Petitioners' proposals to promote innovation by both ILECs and CLECs.

## II. IMPAIRMENT IS NOT AT ISSUE

ILECs contend that the Petitions would reverse a decision in the *TRO* that CLECs are not impaired without access to ILEC loops for the provision of broadband.<sup>19</sup> This argument is specious because the Commission never found that CLECs were unimpaired without access to ILECs loops for provision of broadband. It actually said exactly the opposite:

...we find that requesting carriers are generally impaired on a national basis without unbundled access to an incumbent LEC's local loops, whether they seek to provide narrowband or broadband, or both.<sup>20</sup>

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According to Art. 3 (2) of this Regulation, incumbents "meet reasonable requests from beneficiaries [competitors] for unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions. Requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity." According to the EU's 12th Implementation Report, 13 EU member states alone have already surpassed the United States in broadband penetration rates. EU 12th Implementation Report [http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/annualreports/12threport/com\\_2007\\_155\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/12threport/com_2007_155_en.pdf), see Commission Staff Working Document, p. 30 (Chart).

<sup>19</sup> Verizon at 2; AT&T at 7, 15; USTA at 10, 12.

<sup>20</sup> *TRO* ¶ 248.

The Commission found that high fixed and sunk costs, large economies of scale, and operational barriers created impairment for the provision of broadband or narrowband services without access to ILEC loops.<sup>21</sup> Moreover, it contemplated that CLECs would use unbundled copper loops to provide xDSL broadband services,<sup>22</sup> such as ADSL, HDSL, UDSL, and VDSL.<sup>23</sup> Far from determining that CLECs did not need loops for provision of these broadband services, the Commission found that:

...we determine that unbundled access to conditioned, stand-alone copper loops ... is sufficient to overcome such impairment for the provision of broadband services.<sup>24</sup>

The Commission found that CLECs were unimpaired for provision of broadband *only* with respect to “the next-generation network capabilities of fiber-based local loops, *i.e.*, those loops that make use of fiber optic cables and electronic optical equipment capable of supporting truly broadband transmission capabilities ...”<sup>25</sup> This finding was limited to next-generation fiber technology consistent with the ILECs' mantra of “new investment, new rules.” Not only did the Commission not rule that CLECs are unimpaired for provision of broadband service generally, but it specifically mandated access to copper loops *because of* CLEC impairment for provision of broadband.

Petitioners are not seeking any modification of the Commission's impairment analysis in the *TRO*, nor are they seeking reconsideration of the *TRO* with respect to unbundled access to

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<sup>21</sup> *TRO*, n. 739.

<sup>22</sup> *TRO* ¶ 215 (“For the mass market, carrier can use copper loops to provide both narrowband voice service and broadband xDSL services.”)

<sup>23</sup> *TRO* n 661.

<sup>24</sup> *TRO* ¶ 248.

<sup>25</sup> *TRO* ¶ 272.

next generation fiber-based network capabilities. Petitioners seek revised rules governing ILEC retirement of copper loops, not revised impairment findings. Rather, it is the ILECs who are trying to rewrite the Commission's impairment findings in the *TRO*. The Commission should reject the ILECs' characterization of the *TRO*'s impairment findings and of the relief that Petitioners are seeking.

### III. ILEC ASSURANCES OF NON-RETIREMENT ARE NOT CONVINCING

ILECs contend that they have not retired significant amounts of copper.<sup>26</sup> However, they provide no convincing rebuttal to the concern that they have strong anticompetitive incentives to retire copper loops.<sup>27</sup> Quite the opposite. Their insistence that they should have unlimited discretion to retire copper and, moreover, be allowed to retire copper (and thereby remove it from unbundled access) by a mere declaration heightens this concern.<sup>28</sup>

Even if ILECs are not currently retiring copper, there may be temporary reasons for not doing so, raising the possibility that they will engage in widespread retirements in the future. ILECs may be inhibited from retiring copper now because of economic concerns about fiber deployments as well as a potential need to retain copper for broadband service in light of technical developments. AT&T may be considering the purchase of Echostar or DIRECTV.<sup>29</sup> If so, it would likely continue to need copper and might never significantly build out fiber because fiber would cannibalize satellite video service. In short, ILECs may well be hedging their bets that

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<sup>26</sup> AT&T at 11; Verizon at 22.

<sup>27</sup> Petition at 4-7.

<sup>28</sup> See Section V, *infra*.

<sup>29</sup> AT&T Buyout of EchoStar "Less Likely," SeekingAlpha, March 10, 2007, <http://media.seekingalpha.com/article/29165>, viewed March 23, 2007.

may for the time being counterbalance their anticompetitive motivations to retire copper unnecessarily.

Such transient considerations provide no assurances to CLEC business plans, while the uncertainty created by existing rules inhibits CLECs' long-term investment in new copper-based technology that could benefit consumers. As long as ILECs could embark on widespread retirements at any time, the need for revised retirement rules remains. The Commission should create regulatory certainty by promptly granting the Petition and adopting the requested rules.

In any event, it is far from clear that some ILECs have not already stepped up the pace of retirements. In February and March, 2007 Verizon posted 100 notices of network changes on its website for replacement of copper with fiber in the feeder portion of loops in New Jersey, Pennsylvania, and Maryland. In the previous 5 years Verizon posted a total of 33 notices of network changes for any reason and only one of those was for retirement of copper. These 2007 notices apparently reflect a policy decision by Verizon to aggressively and unnecessarily retire copper loops. In fact, it seems likely that Verizon has made this change in order to evade the impact of new rules the Commission might adopt in response to the Petition. Verizon's new policy of aggressively retiring copper loops clearly demonstrates the need for the Commission to stay ILEC copper retirement efforts and to expeditiously adopt new rules as requested in the Petition.

Accordingly, the ILECs' claims that they are not retiring copper loops does not lessen the need for the Commission to promptly grant the Petition.

#### **IV. LIMITS ON RETIREMENT OF COPPER WILL PROMOTE BROADBAND GOALS IN AREAS NOT SERVED BY FIBER**

Most ILECs are not installing overbuild fiber; only Verizon has current plans only to do so -- for 50% of its subscribers.<sup>30</sup> Even where Verizon is installing fiber, it has the low take rate of 10% for FiOS service.<sup>31</sup> Thus, a very large number of subscribers either are not on the list for receiving the touted benefits of fiber, or don't want FiOS. Copper loops provide these customers another choice for receiving broadband service. Further, CLECs using copper can bring broadband service to these customers immediately and without the need for expensive and time consuming fiber installation. In fact, for many customers copper-based broadband services will be a more affordable and desirable service than FiOS, which though technically superior to copper, may have more capacity than many consumers need or want to pay for.

In addition, the ability of CLECs to use legacy copper affords options to those consumers that subsequently choose to terminate FiOS service after some experience with it and the end of promotional rates. The availability of copper to competitive providers also reduces Verizon's ability to impose prices increase for POTs if consumers subsequently choose to receive only voice service after a trial of FiOS. It is contrary to the public interest to foreclose consumers' choices for lower priced services.

The availability of copper loops also directly supports the Commission's Rural Healthcare Pilot Program. The improved technical capacity of copper provides an affordable, immediately

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<sup>30</sup> Verizon at 11.

<sup>31</sup> Verizon's FiOS TV Reaches 10 Percent Penetration, Media Buyer Planner, October 31, 2006, <http://www.mediabuyerplanner.com/2006/10/31/verizons-fios-tv-reaches-10-percent-penetration/>, viewed March 20, 2007.

available means for rural areas to participate in this program without the expense and delay of installing fiber.

Section 706 of the Telecommunications Act of 1996 directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...”<sup>32</sup> and specifically identifies “measures that promote competition in the local telecommunications market” as one of the ways to pursue this goal. Given that ILECs are leaving many customers behind in their provision of broadband services, the Commission can promote Section 706 goals by assuring that CLECs have access to the copper loops that ILECs would otherwise abandon, thereby allowing more broadband options for consumers.

**V. ILECS CONFIRM THAT THEY INTEND TO FORECLOSE UNBUNDLING WHILE LEAVING COPPER IN PLACE AND READY TO USE**

Retaining copper would not impose unreasonable burdens because Verizon admits that it intends to retire copper in place.<sup>33</sup> Petitioners do not dispute Verizon’s contentions that it would be more expensive and even impractical to remove copper in many cases and that, therefore, it makes more sense to leave the copper loop in place. But if the copper is in place, and capable of use with some reasonable attention to assuring that it is technically capable of use, it serves the public interest to continue its availability for competitive unbundled access. For all the reasons stated in the Petition, there is no justification for permitting a valuable asset to be wasted for no reason or, especially, for anticompetitive reasons

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<sup>32</sup> § 706, Pub.L. 104-104, Title VII, February 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

<sup>33</sup> Verizon at 20.

Verizon's statement that it may "retire" copper in place invites abuse by ILECs. ILECS would be able to "retire" loops merely by declaration, but also potentially "unretire" the loop at any time, since there are no rules prohibiting this practice. This would permit ILECs to evade the unbundling obligations of the Act with respect to facilities for which CLECs are impaired. Such a practice is patently unlawful under Section 251(c)(3) because the Commission has determined, as discussed above, that CLECs are impaired without access to copper loops for the provision of both narrowband and broadband services.

The Petition pointed out that the Commission's current rules are not clear regarding what constitutes retirement.<sup>34</sup> Verizon's discussion of in-place retirement verifies this point. In order to avoid waste of valuable assets and preclude ILEC abuse, the Commission should define retirement to mean the physical removal of copper. Except in limited circumstances involving *force majeure* or accidents and the like, copper loops should remain available for unbundled access wherever CLECs are impaired as found in the *TRO*.

## **VI. RETAINING COPPER WOULD NOT IMPOSE UNREASONABLE BURDENS ON ILECS**

ILECs contend that limiting retirement would impose unreasonable burdens. As noted, however, current rules already provide that ILECs do not need to maintain spare copper.<sup>35</sup> In addition, initial comments demonstrate that, as a practical matter, ILECs will not be able to avoid the expenses of maintaining copper. Even where ILECs overbuild with fiber, until 100% of

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<sup>34</sup> Petition at 10.

<sup>35</sup> *TRO* ¶ 277.

customers subscribe to fiber-provided services, ILECs must keep the copper network in place.<sup>36</sup> Since Verizon's take rate for FiOS service is 10%, there is less likelihood of any significant removal of copper in the immediate future, although anticompetitive motives could compel Verizon to do so at any time. And, even where ILECs are overbuilding with fiber, they are not overbuilding throughout their service territory. Verizon installs fiber loops primarily in affluent areas and has no plans to provide it to 50% of its subscribers. Even where fiber DLCs are employed, the rest of the loop is copper.<sup>37</sup> Therefore, Verizon is required to operate all necessary copper management systems including inventory, repair, test and associated technical staff,<sup>38</sup> even though this is not required for loops eligible for retirement under FCC rules. Therefore, Petitioners' proposals will not impose any significant maintenance burdens on ILECs.

Further, since these copper loops are ones that ILECs would otherwise retire, they presumably are superfluous to other ILEC facilities and Petitioners' proposals would not impose any operational burdens either. ILECs would be able to charge cost-based prices, including a reasonable profit, when providing copper loops as UNEs. These prices would be a windfall to ILECs who would otherwise receive nothing if they retire the loop.

Verizon's claim that retiring copper would allow it to stop maintaining burdensome copper loop inventory records is bogus.<sup>39</sup> Verizon is required as a practical matter to maintain inventory records of its in-place copper loop facilities even if it is not using them, especially

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<sup>36</sup> Isfan at 6.

<sup>37</sup> Isfan at 4-5

<sup>38</sup> Isfan at 6.

<sup>39</sup> Verizon at 20.

where they are in public rights-of-way. Nor is maintaining these records burdensome in any event.

Therefore, ILECs have not made a showing that they will experience unreasonable burdens because of the proposed limits on their discretion to retire copper loops.

## VII. UNE PRICING RULES ARE NOT AT ISSUE

The Commission should reject the ILECs' argument that TELRIC would not adequately compensate them for use of copper loops they would otherwise retire.<sup>40</sup> These concerns express little more than dissatisfaction with a forward looking cost methodology for pricing UNEs. This issue is already the subject of an open proceeding examining TELRIC<sup>41</sup> and need not be addressed here.

More importantly, ILECs' complaints about pricing levels and methodology are not *bona fide*. In the event that ILECs retire copper loops, they would receive no compensation whatsoever for those loops. Thus, their concerns about the suitability of TELRIC for copper plant,<sup>42</sup> allocation of joint and common costs,<sup>43</sup> and alleged assumptions by states about use of plant to serve ILEC customers, etc., are totally irrelevant given that ILECs, in effect, would be receiving a windfall, for plant they would otherwise discard.

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<sup>40</sup> Verizon at 17, Qwest at 3.

<sup>41</sup> *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*. WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (September 15, 2003).

<sup>42</sup> Verizon at 17-18.

<sup>43</sup> USTA at 14.

In any event, while Petitioners believe that ILECs should receive compensation for providing unbundled access to copper loops, TELRIC rates would likely overcompensate ILECs for plant that would otherwise be unused. Further, copper plant has already been paid for multiple times by the public and has been heavily depreciated by ILECs.<sup>44</sup> ILECs have failed to address the observation in the Petition that, based on previous depreciation, consumers have already fully paid for copper loops.<sup>45</sup> TELRIC pricing effectively allows them to depreciate the same plant again, by basing rates on the cost of a newly-deployed network. The ILECs' failure to address, much less effectively rebut, this point strongly suggests that they are not making good faith complaints about pricing.

### **VIII. THE GREATER CAPACITY OF COPPER SUPPORTS THE REQUESTED NEW RETIREMENT RULES**

Petitioners generally agree that the capacity of fiber is "vast" in comparison to copper, that copper has inherent limitations, and that it will never offer the capacity of fiber.<sup>46</sup> Nonetheless, as noted by the Commission in the *TRO*, copper can be used to provide xDSL broadband services. Similarly, recent developments have created the ability to provision video programming over xDSL copper-based technology. New IEEE standards greatly improve the through-put of copper.<sup>47</sup> Cavalier Telephone, LLC is using copper and ADSL2, a technology specifically contemplated by the Commission in the *TRO*, to provide the triple play of voice, Internet access,

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<sup>44</sup> Udovic at 5-6.

<sup>45</sup> Petition at 4.

<sup>46</sup> Corning at 2; Verizon at 14.

<sup>47</sup> *IEEE Standard for Information Technology, Part 3: Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specification, IEEE Std 802.3an-2006*, IEEE, 3 Park Avenue, New York, NY 10016-5997, September 1, 2006.

and full motion video programming to consumers in Richmond, Virginia. Some rural ILECs are also providing the triple play over legacy copper.<sup>48</sup> Notwithstanding the superior capacity of fiber, copper loops permit CLECs to offer consumers new broadband service choices at competitive prices. Just as some consumers purchase a Saturn even though a Mercedes-Benz has a more powerful engine, some consumers may prefer more economical broadband options that do not have state-of-the-art capabilities.

Indeed, the superior capacity of fiber supports the requested new retirement rules. As noted, the Commission in the *TRO* exempted next generation fiber from unbundling obligations, but not copper loops, for provision of broadband services. CLECs are relegated to second class facilities under broadband rules in light of the lesser technical capacity of copper. ILECs should stop complaining and do what the Commission intended, namely deploy fiber to exploit its advantages to provide superior choices and options to consumers. None of Corning's bravura about the fiber optics it wants to sell to ILECs changes the fact that competition between CLEC copper-based and ILEC fiber-based broadband services will provide an overwhelming public interest benefit.

Accordingly, the Commission should take steps to assure that copper loops will remain available for unbundled access, which, in turn, should provide incentives to the ILECs to take advantage of the superior capacity of fiber.

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<sup>48</sup> *SureWest Launches IP-Video Over Copper*, Telephony Online, [http://telephonyonline.com/broadband/web/telecom\\_surewest\\_launches\\_ipvideo/](http://telephonyonline.com/broadband/web/telecom_surewest_launches_ipvideo/) (January 10, 2007).

## IX. THE AVAILABILITY OF COPPER LOOPS ENHANCES PUBLIC SAFETY

ILECs claim that the availability of copper loops does not promote national security goals because copper and fiber loops run in parallel and a terrorist attack would affect both.<sup>49</sup> The Commission should reject this simplistic claim. While it is possible that an attack or natural disaster *might* equally affect copper and fiber running in parallel, the Commission should not consider only this worst-case scenario. Because of the different technical characteristics of copper versus fiber, one or the other might prove more resilient in a particular case, depending on the nature of the disaster or attack. The existence of redundant, parallel loops with different technical characteristics and ability to withstand attacks and other disasters, promotes security and the chances for rapid recovery from various kinds of attacks and disasters.

ILECs claim that fiber is more likely to withstand an attack because copper requires more frequent repeaters.<sup>50</sup> While fiber uses fewer repeaters, however, it is not line powered. Copper is line powered which provides a very significant advantage if an attack or disaster caused a power outage. It cannot be emphasized enough that it is only with line-powered services that customers may reach 911 services after an extended power outage. Such differences reinforce the point that having different facilities available with different capacities promotes national security.

Moreover, the diversity of providers as well as of facilities promotes national security. Attacks and disasters can affect not only loops but facilities connected to loops which do not run in parallel. An attack which might affect Verizon's switching facilities or ability to restore service in a particular area might not affect a CLEC at all. AT&T's statement that ILECs follow

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<sup>49</sup> AT&T at 14; Verizon at 24.

<sup>50</sup> Verizon at 24.

prudent engineering practices is comforting,<sup>51</sup> but does not show that the availability of services provided by CLECs -- who also follow prudent engineering practices -- does not promote national security.

USTA claims that homeland security is best promoted by Commission policies established in the *TRO* that promote infrastructure investment. This argument, however, assumes that investment and innovation are promoted by unlimited ILEC discretion to retire copper loops.<sup>52</sup> But, as already discussed, ILECs' ability to retire loops harms infrastructure investment. Therefore, USTA's repetition of incentive arguments does not show that homeland security is promoted by retiring copper loops.

Accordingly, the Commission should conclude that limiting the ability of ILECs unnecessarily to retire copper loops would promote homeland security goals.

#### **X. ILEC CONCERNS ABOUT AUCTIONS ARE UNFOUNDED**

ILECs complain that a requirement that they sell copper loops in lieu of retirement would not assure that they obtain fair market value. This concern is specious. Petitioners request that the Commission *consider* an auction requirement as an alternative to retirement. As noted, however, retirement, whether by removal, or declaration would result in the ILEC receiving no compensation at all for the loop. Thus, ILECs' concerns about auction pricing are intended to mask their real concern: that they do not want copper loops to be available so that CLECs can compete with ILEC services.

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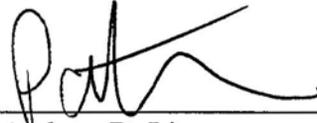
<sup>51</sup> AT&T at 14.

<sup>52</sup> USTA at 11, 17.

ILECs also contend that auctions would be unduly complicated. ILECs are correct that the sale of loops would require rules concerning, for example, access to purchased loops in ILEC central offices. These rules are already in place, however, in the form of the collocation rules implementing Section 251(c)(6) of the Act. In addition, ILECs have already established operating processes for access to loops, including for collocation and cross-connects etc. While a need for some refinement of these rules might be revealed in the course of the rulemaking requested by the Petition, ILECs seriously exaggerate when they suggest that sweeping new regulatory programs would be required. That said, Petitioners did not propose that the Commission compel auctions, but merely that it entertain comments on whether such a course would be feasible and desirable. Petitioners continue to believe it would be useful for the Commission to explore this approach and obtain a record in the context of a rulemaking. Accordingly, the Commission should consider whether to adopt rules governing auctions of loops that ILECs seek to retire.

## XI. CONCLUSION

For these reasons, and all the reasons stated in the Petition, the Commission should promptly initiate the requested rulemaking.



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